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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)
Cable Home Wiring)

MM Docket No. 92-260

COMMENTS

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The Commission should require compensation for inside home wiring regardless of "ownership" for tax purposes. Payment should be based on unrecovered costs, replacement value, or reciprocal compensation arrangements negotiated by competing providers. FCC rules should be exclusive, preemptive, and applicable to all multichannel providers.

Commercial wiring and common wiring within MDUs should be left to existing commercial arrangements. The FCC's rules should not be used to preclude access (through common areas) to individual residents of MDUs. Loop through wiring is not transferable.

No transfers should be required after termination for theft or nonpayment.

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COMMENTS

The home wiring provisions of the 1992 Cable Act apply only in limited circumstances. They apply only to the FCC-compelled "disposition" of wiring within the "premises" of a subscriber upon that subscriber's termination. The House Report accompanying the provisions adopted explain that "premises" refer only to "internal wiring" within the interior premises of an individual's "dwelling unit." H. Rep. 102-628 at 118-19. These and comparable elucidations, combined with the announced purposes of the home wiring provisions and of the 1992 Cable Act, require the Commission to follow three primary directives in fashioning its home wiring rules.

I. FCC-Compelled Dispositions of Individual Inside Wiring Are the Only Dispositions Which May Be Compelled By Government

A. FCC Rules Should Require Compensation for Use Regardless of "Ownership" for Tax Purposes

According to the Senate Report accompanying an identical home wiring provision in S. 12, the FCC "should" go beyond the inside wiring provisions applied to local exchange

carriers and require transfer of ownership (as well as the incidents of ownership) to individual subscribers who terminate service. S. Rep. 102-92 at 23. The "internal" wiring excludes external wiring, such as drops and junction boxes, as well as converters, amplifiers, and other equipment installed within the home.

The "ownership" of residential home wiring has been debated and litigated in "overbuild markets" and in certain cases where state taxing authorities seek to assess real or personal property taxes on home wiring. Congress was concerned with providing individual subscribers with freedom to choose service from a competing provider without disruption within the dwelling unit. S. Rep. at 23. It contemplates a uniform federal rule to govern that disposition. Although some states ascribe "ownership" for tax purposes to the cable operator or to the resident, these decisions on tax policy are irrelevant for purposes of the federal rule. ^{1/} For example, in overbuild

^{1/} Compare TV Transmission Inc. v. County Board of Equalization of Pawnee County, 215 Neb. 363, 338 N.W.2d 752 (1983) and Tele-Vue Systems, Inc. v. County of Contra Costa, 25 Cal. App. 3d 340 (1972) (drops not taxable as operator's personal property) with Continental Cablevision of Roseville v. City of Roseville, 158 Mich. App. 60, 404 N.W.2d 704 (1987) (drops are taxable as operator's personal property) and with Hoppe v. Televue Systems, Inc., Wash Tax Appeals Bd. Docket Nos. 13386-13390, Slip Op. (July 20, 1976) (operator's depreciation of drop installation costs for federal income tax purposes is not dispositive of its ownership for property tax purposes).

litigation concerning home wiring ownership in Glasgow, Kentucky, the court ruled that inside wiring was the property of the company that installed it, notwithstanding evidence that an affiliate treated such wiring, for tax purposes, as the property of homeowners.^{2/} Thus, the FCC rule should apply regardless of whether state taxing decisions have ascribed ownership to the individual subscriber or to the cable operator. What is at issue in the federal rule is the permanent use of valuable property installed by a cable operator.

B. Compensation Should Be Pursuant to
Operator Policies Based on Comparable
Averages

The uncompensated permanent use of such wiring would, of course, be an unconstitutional taking.^{3/} To avoid that taking, the FCC rule should permit an operator to adopt a written policy of collecting compensation from individual terminating subscribers. The amount of that compensation should not be more than (1) the the average unrecovered cost of inside wiring for comparable installations or (2) the cost of replacement, whichever is greater. A modest markup for transaction costs may

^{2/} Telescripps Cable Co. v. Electric Plant Board of the City of Glasgow, Civ. No. 89-CI-269 (1989) (preliminarily enjoining competitor's use of home wiring).

^{3/} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

also be collected. Such a policy will avoid a burdensome dwelling by dwelling inquiry in favor of more objective, average standards.

C. FCC Rules Should Facilitate Collection of Compensation

No ownership of wiring should vest in a subscriber until the cable operator is compensated for wiring and any delinquent amounts owed. If no compensation is paid, an operator may remove the wiring or abandon it in place.

A subscriber who has terminated service from one provider in preference to another is not highly motivated to pay compensation for use of home wiring. The subscriber has physical possession of the wiring and of the premises within which it is locked. The former provider cannot threaten disconnection of service for nonpayment, because his competitor is providing service. A collection action may not be cost effective, and is not the best means of competing to regain customer loyalty.

It would facilitate collection if the FCC rule permitted competing providers to cooperate with payment and collection of home wiring charges. Each provider could pay the other for customers who switch, and the provider who then has a billing relationship could collect from the affected customers. Where competing providers have reached reciprocal collection arrangements, it should be permissible for them to agree upon an

alternative stipulated "market" valuation. This would create "market" pricing, reduce transaction costs and facilitate transfers.

D. Transfer May Not Be Required Prior to Termination of Service

The FCC has not been given authority to compel third party use of inside wiring, transfer, or other "common carrier" obligations prior to termination of service. Both the statutory references to terminating subscribers and instructions in the Senate and House Reports preclude compulsory transfer prior to termination. S. Rep. at 91, H. Rep. at 118. Indeed, compulsory transfer prior to termination would unduly complicate a cable operator's responsibility to control signal leakage and to charge for additional outlets.

E. FCC Rules Should Be Exclusive and Preemptive

The FCC rules should be exclusive and preemptive. The purpose of the home wiring rules is to promote uniform portability of individual home wiring which overrides inconsistent practices in competitive (overbuild) markets to date. That purpose, along with express statutory pro-competitive purposes (e.g., 1992 Act §§ 2(a)(2), 2(b)), will be frustrated by overlapping and varying local franchising provisions seeking to control home wiring. For example, a local franchise compelling transfer of home wiring prior to termination would create exactly

the problem the Congress sought to avoid by limiting transfer to terminating subscribers. For these reasons, the preemptive policies of Sec. 636 of the Cable Act apply to the Commission's home wiring rules. As a result, municipal franchising authorities may not compel "takings" or adjust compensation for home wiring, as such are governed exclusively by FCC rule.

F. Cable Operators May Volunteer Alternative Procedures

This does not mean that cable operators may not voluntarily offer policies which go beyond government compulsion. An operator who offers a "whole house" policy might also transfer ownership of inside wiring but offer an optional maintenance contract. An operator might conceivably abandon wiring without compensation. Such offers, however, may not be compelled by FCC rule or by local franchise. Local franchise provisions which "compel" such volunteerism are preempted and void.

G. FCC Home Wiring Rules Should Extend to Wiring of All Multichannel Video Providers

The Commission should take this opportunity to extend its ancillary jurisdiction to apply its home wiring rules to any multichannel video provider. Inside wiring is often installed by SMATV or MMDS, and subscribers may shift back and forth among such providers and cable. Whether or not the inside wiring installer also uses public rights of way is immaterial to the

resident's right to wiring within his or her dwelling. There is no reason the Commission may not facilitate such shifts by extending its rules to competing providers.^{4/} Such an extension may also minimize Equal Protection challenges to the rules.

II. Disposition of Commercial and MDU Common Wiring May Not Be Compelled by FCC Rule

A. Commercial and MDU Wiring Is Subject to Satisfactory Commercial Arrangements

The ownership and use of wiring installed outside of individual dwellings has been the subject of occasional litigation, usually as an incident to overbuilds or competition between a franchised cable operator and a SMATV system. The outcome typically depends upon the intention of the parties at the time the commercial contract is entered.^{5/} Indeed, because MDU and commercial properties (campuses, hotel/motel, etc.) are often served under negotiated "bulk" agreements, the terms of ownership and transfer of commercial wiring are negotiated. Frequently, the price to "buy out" a commercial contract declines over time as the substantial cost of wiring is amortized.

^{4/} United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

^{5/} For example, during an overbuild in and around Jackson, Mississippi, a jury found that the incumbent operator owned the inside wiring in one MDU, but not in another. American TV & Comm. v. Truvision, J 87-0181(L) (S.D. Miss., Nov. 29, 1987).

Congress has expressed no dissatisfaction whatever with these commercial arrangements.

B. Compulsory Transfer of Home Wiring Does
Not Extend to Such Commercial Arrangements

Instead, Congress has specifically carved out commercial accounts from mandatory disposition. The House Report speaks of an "individual['s]" "dwelling unit" -- not an institutional commercial account. It specifically carves out from MDU's the "common wiring within the building" -- presumeably junction boxes, risers, and wiring within or along hallways. H. Rep. at 119. Likewise, the policy basis for these provisions -- to promote portability of wiring within an individual's "dwelling" -- does not extend to override the commercial arrangements under which commercial properties have been wired and their bulk rates negotiated. Thus, the FCC's rules should not compel transfer of wiring to commercial properties or in MDU's wiring in common areas.

C. Excluding Commercial and MDU Common Wiring
Is Essential to Promote Resident's Freedom
of Choice Among Cable Providers

Apart from fidelity to the statute, there is an additional reason the FCC should not compel transfer of commercial wiring. Many states and franchising authorities follow "access to premises" laws under which residents are afforded access to their provider of choice. It is commonplace

for competing "private cable" operators, in litigation and in their commercial conduct, to seek to frustrate access and keep these residents as their captive clientele.^{6/}

The Commission should be vigilant in assuring that its home wiring rules are not used to frustrate the right of individual residents to choose their provider. In single family residential developments, transfer of home wiring does not prevent one competitor or the other from competing for the resident's business: the physical drop wire and exterior wiring will still "pass" the dwelling and make competition possible. By contrast, in MDUs, transfer of common wiring will preclude individual residents from choosing their provider. If a cable operator loses ownership and use of the common wiring, its lines will not "pass" the dwelling and competition is precluded. Thus, to serve the pro-competitive policies of the 1992 Act, the Commission should not compel the disposition of common wiring in MDUs or wiring in any commercial property. It should announce that its rules may not be used to frustrate access to premises under state, federal, or local law. It should also preempt state or local efforts to transfer inside wiring which would thwart or impede this pro-competitive decision.

^{6/} Amsat Cable Limited Partnership III v. Woodgate at Enfield Limited Partnership, 1991 Conn. Super LEXIS 674 (Supr. Ct. Conn., March 25, 1991) is one of the many cases involving a "private cable" operator's efforts to prevent residents from obtaining access to competing cable services.

III. The FCC Rules Must Minimize Theft and Disruption of Service

A. No Transfer Is Required After Theft or Nonpayment

The House Report clarifies that the home wiring rules must be consistent with protections against theft of service. H. Rep. at 118. Accordingly, transfers should not be required where a subscriber is terminated for theft or for nonpayment (which is economically indistinguishable from theft).

B. No Transfer Is Required of Loop Through MDU Wiring

There is also one configuration of MDU wiring which precludes transfer of wiring without disrupting service to paying subscribers. "Loop through" wiring extends a continuous loop through multiple "dwellings." Although not the common practice, buildings using this wiring cannot sever ownership of a part of the loop -- even if physically located within an individual "dwelling" -- without disconnecting "downstream" subscribers. In these limited circumstances, loop through wiring should be treated as common wiring, and not subject to individual transfer.

CONCLUSION

For the foregoing reasons, the Commission should adopt preemptive rules governing transfers of individual's dwelling unit wiring consistent with the foregoing principles.

Respectfully submitted,

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